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No. 84-1119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STUART C. GOLDBERG,

Petitioner,

—against—

SITOMER, SITOMER & PORGES, ALVIN LESTER SITOMER, STEPHEN JOEL SITOMER, JACOB ASCHKENASY, EMPIRE FIRE AND MARINE INSURANCE COMPANY, GARY O. GROSS and YALE J. KAPLAN,

Respondents,

—and—

ROBERT PORGES,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court exercise its discretion to review a decision by the New York Court of Appeals which dismissed, as barred by New York's Statute of Limitations, petitioner's state common law tort claims, where the only federal issue alleged by the petitioner is that the New York courts, in the course of deciding the Statute of Limitations question, construed a federal decree in a prior related action to determine whether it barred the petitioner from timely asserting his state common law claims?

LIST OF RELATED CORPORATIONS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondent Empire Fire and Marine Insurance Company submits this list of related corporations, all of which are privately owned:

Parent:	Zurich Holding Company of America, Inc.
Subsidiary:	Empire Indemnity Insurance Company
Affiliates: (U.S. only)	American Guarantee and Liability Insurance Company
	American Zurich Insurance Company
	Atlas General Agency, Inc.
	Atlas General Inc.
	Universal Buyers Club, Inc.
	Universal Management Inc.
	Universal Underwriters Insurance Company
	Universal Underwriters Life Insurance Company
	Universal Underwriters Lloyds
	Universal Underwriters of Texas
	Zurich American Insurance Company of Illinois
	Zurich American Life Insurance Company
	Zurich American Lloyds
	Zurich Reinsurance Company of New York

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Respondents,

— and —

ROBERT PORGES,

Defendant.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Sitomer, Sitomer & Porges (the "Sitomer firm"), Alvin Lester Sitomer and Stephen Joel Sitomer (the "Sitomers"), Jacob Aschkenasy ("Aschkenasy"), Empire Fire and Marine Insurance Company ("Empire"), Gary O. Gross ("Gross") and Yale J. Kaplan ("Kaplan") submit this brief in opposition to the Petition of Stuart C. Goldberg ("Goldberg") for a writ of certiorari to the New York Court of Appeals, which unanimously affirmed the dismissal of Goldberg's state common law claims on the ground that they were barred by a state Statute of Limitations.

STATEMENT OF THE CASE

Introduction and Summary

This action is a continuation of a class action commenced in 1973 in the United States District Court for the Southern District of New York against Empire and its officers, Gross and Kaplan (collectively the "Empire respondents"), and the Sitomer firm and its partners, the Sitomers and defendant Robert Porges (collectively the "Sitomer respondents"). The class-action plaintiffs charged that a public offering of Empire securities was false and misleading in that Empire's registration statement, which was prepared by the Sitomer respondents and their associates, Goldberg and Aschkenasy, failed to fully disclose the Sitomer firm's compensation agreement.

Empire cross-claimed for indemnification against the Sitomer respondents, Aschkenasy and Goldberg, joining the latter two as third-party defendants, asserting that Empire had relied on them to prepare an accurate registration statement. Goldberg then cross-claimed and counterclaimed against the Empire and Sitomer respondents and Aschkenasy, claiming that all of them had conspired together to file a false prospectus and had caused the public to believe that Goldberg was a knowing participant in their wrong-doing.

After the class action was settled, the United States Court of Appeals for the Second Circuit dismissed Empire's and Goldberg's claims for want of federal jurisdiction. Goldberg then commenced an action in the New York Supreme Court.

The New York courts held that Goldberg's claims, however denominated, were for injury to his reputation. They therefore held that New York's one-year Statute of Limitations for defamation actions applied.

All of the parties and all three New York courts that considered Goldberg's claims agreed that Goldberg's state court action would be deemed to be timely commenced if, but only if, he had timely asserted his claims in the prior federal action.

The Appellate Division of the New York Supreme Court determined that Goldberg's claims accrued on January 22, 1973, and that even after application of all "relation back" provisions of the New York Civil Practice Law and Rules ("CPLR"), the earliest date Goldberg would be deemed to have asserted his claim in the federal courts was March 24, 1974, three months after the Statute of Limitations had run. Accordingly, it held that Goldberg's claims were time-barred.

In the New York Court of Appeals, Goldberg argued, *inter alia*, that he had been unable to assert his claims within the one-year period because he had been enjoined by the federal district court from disclosing confidential information about Empire. Goldberg had previously made this argument to the New York Supreme Court, which had rejected it after carefully reviewing the text of the federal decrees. Goldberg had not raised the issue in the Appellate Division.

During oral argument, several of the judges on the New York Court of Appeals expressed disbelief that the federal decree had barred Goldberg from asserting his claims. The Court of Appeals then affirmed the dismissal of Goldberg's complaint, without expressly commenting on Goldberg's argument concerning the federal decree.

At no point in any of the New York proceedings did any party or any judge ever suggest that the federal decree should be treated differently from a state decree. In every instance, the issue of the federal decree was discussed solely in terms of its scope, and not its validity or binding effect.

The Nature and Facts of the Case

A. The Pleadings

Goldberg is an attorney who was formerly employed by the Sitomer firm as an associate. Goldberg alleges that the Empire and Sitomer respondents and Aschkenasy conspired together to induce him to assist in filing with the Securities and Exchange Commission (the "SEC") a registration statement that failed to

adequately disclose the compensation arrangements between the Sitomer firm and Empire. Goldberg claims that his professional reputation was injured as a result of adverse publicity that arose after he brought the alleged non-disclosure to the attention of the SEC. Goldberg seeks compensatory damages of $2,938,043.70 from all the respondents and punitive damages of at least that amount.

No answer has yet been served to Goldberg's complaint.

B. The Federal Action

The allegedly false filing with the SEC took place on May 31, 1972. Goldberg claims to have discovered its falsity on or about January 20, 1973. On January 21, 1973 Goldberg resigned from the Sitomer firm and the following day advised the SEC of the allegedly improper omissions in Empire's registration statement.

On April 12, 1973, Empire filed a Form 10-K with the SEC that disclosed the compensation arrangements between Empire and the Sitomer firm. On May 2, 1973, two Empire shareholders, Dietrich Meyerhofer and Herbert Federman, commenced a class action in the United States District Court for the Southern District of New York, entitled *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 73 Civ. 1940 (LFM) ("Meyerhofer"), against the Empire and Sitomer respondents and others. Although Goldberg was initially named as a defendant in that action, he was never served with process, and the class-action plaintiffs dropped him as a party after he agreed to cooperate with and assist them in suing his former law firm, colleagues and client.

On August 23, 1973, the district court, on Empire's motion, held that Goldberg had violated his duty to maintain client confidences. Accordingly, it ordered (the "MacMahon decree"):

> "counsel for plaintiffs and Goldberg are enjoined and barred from acting as counsel or participating in any way with counsel for the plaintiffs in this action or

> in any future action against Empire involving the same transactions, occurrences, events, allegations, facts or issues, and they are further enjoined from disclosing confidential information regarding Empire to others except to comply with rulings of the court on discovery proceedings or upon trial." (42a.)*

Counsel for the class-action plaintiffs appealed to the United States Court of Appeals for the Second Circuit, and Goldberg joined in their appeal as an intervenor. However, neither they nor he moved for reargument or to modify or clarify the MacMahon decree. Moreover, at no time prior to May, 1974, over 8 months after the MacMahon decree was issued, did Goldberg advise the district court or the Court of Appeals that he wished to assert any claims against any of the respondents, or that he was concerned that the MacMahon decree might bar him from doing so.

During the pendency of the appeal of the district court's order, a second class action, styled *Federman v. Empire Fire and Marine Insurance Co.*, 73 Civ. 4616 (LFM), was commenced in the same district court, alleging substantially the same claims as the prior action. Goldberg was not named as a defendant in this action. The two cases were subsequently consolidated and are hereafter referred to collectively as the "Federal Action".

On March 24, 1974, the Empire respondents served their answer in the Federal Action, which included cross-claims against the Sitomer respondents, Aschkenasy and Goldberg. The substance of the answer and cross-claims was that Empire relied on the Sitomer respondents and their associates (including Goldberg) to prepare a registration statement that was accurate, complete and in full compliance with the federal securities laws and SEC rules and regulations. Since Goldberg and Aschkenasy were not parties to the Federal Action, Empire joined them as additional defendants on the cross-claim.

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* References to decisions included in the appendix to the Petition state the appendix page number.

On May 27, 1974, Goldberg served his answer to Empire's cross-claims. Although he filed cross-claims against the Sitomer respondents and Aschkenasy for indemnification and contribution, he did not assert any claim against the Empire respondents.

On June 10, 1974, the United States Court of Appeals for the Second Circuit reversed the district court's dismissal of the class-action complaint in *Meyerhofer*.

On June 16, 1974, Goldberg amended his answer to include a counterclaim against the Empire respondents and cross-claims against the Sitomer respondents and Aschkenasy for damage to his reputation.

On August 22, 1975, all parties to the Federal Action other than Goldberg entered into a settlement which was approved by the district court. The settlement left open the Empire respondents' claims against Goldberg, and Goldberg's claims against the Empire and Sitomer respondents and Aschkenasy.

Thereafter, the district court, on Empire's motion, dismissed Goldberg's claims for legal insufficiency, but granted Goldberg leave to amend. On December 22, 1976 — two and a half years after Goldberg was named as an additional defendant in the Federal Action — Goldberg filed an amendment to an amended answer which contains substantially the same claims as his present state court action.

The Empire respondents then moved to dismiss Goldberg's amended answer. The district court denied their motion and they appealed. On April 2, 1979 the United States Court of Appeals for the Second Circuit dismissed both the Empire respondents' cross-claims and Goldberg's cross-claims and counterclaims for want of federal subject-matter jurisdiction. *Federman v. Empire Fire and Marine Insurance Co.*, 597 F.2d 798 (2d Cir. 1979) ("Federman"). Goldberg did not petition this Court for certiorari.

In the course of its decision, the U.S. Court of Appeals noted that the district court had expressed some concern that dismissal might create a Statute of Limitations bar for Goldberg; however,

the Second Circuit pointedly observed that "Goldberg could have proceeded in the state courts by initiating an action there while his case remained *sub judice* in the federal courts." *Federman*, 597 F.2d at 809 n. 18.

C. The State Court Action

Goldberg commenced his state court action in April 1979, asserting substantially the same claims as he had in the Federal Action. Respondents moved to dismiss, primarily on the ground that Goldberg's claims were barred by New York's Statute of Limitations.

The New York Supreme Court agreed with respondents' contention that Goldberg's claims were all analogous to defamation claims and that they were therefore subject to a one-year Statute of Limitations. It also agreed with respondents that the one-year period commenced in late January 1973. It next considered and rejected Goldberg's argument that he was barred by the MacMahon decree from timely asserting his claims.

The Supreme Court carefully reviewed the applicable text of the MacMahon decree and Goldberg's subsequent conduct, including his assertion of claims against Empire and others while an appeal from the MacMahon decree was still pending. It also pointedly observed that shortly after Goldberg asserted his claims the Court of Appeals had:

> "affirmed the lower court's opinion to the extent that it prohibited Goldberg from *representing* the interests of these or other plaintiffs in the Meyerhofer or similar actions (emphasis in original). It also affirmed, '...so much of the District Court's order as enjoins Goldberg from disclosing material information except on discovery or at trial.' (497 F.2d at 1196)." (10a-11a.)

It therefore concluded that the MacMahon decree had not barred Goldberg from asserting his claims and that Goldberg had ultimately asserted claims only in reaction to being joined in the Federal Action:

> "It is clear that any restraint that he was under pursuant to Judge MacMahon's order was continued by the Second Circuit. It would therefore appear that the reason no cross-claim was instituted by him against the Sitomer defendants or Aschkenasy was due to the fact that he was not brought into the federal action until March 24, 1974, when Empire served its answer and asserted claims against Goldberg." (11a-12a.)

However, the court nevertheless held that Goldberg's claim was timely asserted on the grounds that "the Statute of Limitations was tolled throughout the entire pendency of the federal action." (17a.)

The respondents moved for reargument and appealed to the Appellate Division. The New York Supreme Court adhered to its original determination, but the Appellate Division unanimously reversed and ordered Goldberg's complaint dismissed.

In the Appellate Division, Goldberg dropped his argument that the MacMahon decree barred him from timely asserting his claims, and the Appellate Division did not address that issue. The basis for its decision was its conclusion that under the "relation back" rules of New York, Goldberg was deemed not to have asserted his claims until March 24, 1973, when he was first joined in the Federal Action - three months *after* the Statute of Limitations had run.

In the New York Court of Appeals, Goldberg revived his contention that the MacMahon decree barred him from timely asserting his claims. The issue was fully briefed by all parties. No party so much as suggested that the state courts could or should ignore or fail to give effect to a federal injunction, or that a federal injunction should be treated, for the purposes of CPLR 204(a)*,

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*CPLR 204 (a) provides:

"(a) Stay. Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

in any respect differently from a state court injunction. Instead, the parties argued solely the question of the meaning and intent of the MacMahon decree, and whether it had in fact barred Goldberg from asserting his claims. Indeed, Goldberg himself never contended that the New York Supreme Court, in rejecting his argument, had done so because it did not "recognize" or give "effect" to federal injunctions. He merely argued that: (a) the New York Supreme Court had failed to take into account the psychological pressures that caused him to give the MacMahon decree the widest possible reading and (b) the New York Supreme Court had misconstrued his subsequent actions because the court had not been fully informed of the relevant facts.

During oral argument, the New York Court of Appeals questioned Goldberg's counsel intensively concerning his contentions regarding the MacMahon decree, and several of the judges voiced considerable doubt that the MacMahon decree had barred Goldberg from asserting his claims.

The New York Court of Appeals affirmed the dismissal of Goldberg's claims as time-barred, "for reasons stated in the opinion by Justice Samuel J. Silverman at the Appellate Division," (34a) thus rejecting, *sub silentio*, Goldberg's arguments concerning the MacMahon decree.

SUMMARY OF THE ARGUMENT

Rule 17 of the Supreme Court provides that this Court will not review a state court decision absent "special and important reasons." No such reasons are presented by petitioner.

This case involves the dismissal by the New York Court of Appeals of a state common law claim on the ground that the claim is time-barred by a state Statute of Limitations. The only "federal issue" even remotely raised is that in reaching its decision the state court construed a federal decree issued in a prior related federal action to determine whether it barred the petitioner from timely asserting his common law claim.

While petitioner contends that the New York courts have failed to accord proper recognition to the federal decree, neither the text of the New York courts' decisions nor the prior history of New York's recognition of federal decrees lends any support to petitioner's allegation. At most, petitioner has raised the question of whether the New York courts have correctly interpreted a federal decree.

Since the terms of federal decrees will necessarily vary from case to case depending on the applicable facts, equities and law, review of this case can affect only the interests of the parties hereto. If this Court were to grant certiorari, it would not settle any important questions of federal law or resolve any conflicts among the states, or between federal and state courts.

ARGUMENT

The Supreme Court should deny certiorari since no important federal questions are presented

The Petition presents no "special and important reasons" for reviewing the New York courts' decision: this case involves neither a conflict among the state courts or between state and federal courts nor an important question of federal law. Cf. Rule 17 of the Supreme Court. Indeed, the "federal issue" alleged is so incidental as to be frivolous.

This case involves nothing more than the dismissal by a state court of state common law claims on the ground that they are time-barred under a state Statute of Limitations. The United States Court of Appeals for the Second Circuit held six years ago that the same claims Goldberg has now asserted in the state proceeding do not raise any federal questions. *Federman, supra.*

The only ground Goldberg asserts for this Court reviewing the New York courts' decision is that in the course of determining the Statute of Limitations questions, they considered and rejected his argument that he had been stayed, by the MacMahon decree, from timely asserting his claims.

Petitioner seeks to influence this Court to grant certiorari by inaccurately accusing the New York courts of "ignor[ing] the existence of orders of federal courts" (Petition, page 56) - an accusation belied by his own "Statement of the Case", which acknowledges, however begrudgingly, that the New York Supreme Court expressly considered his argument concerning the MacMahon decree (Petition, pages 38-40).

As we shall show below, the New York courts fully "recognized" and gave "effect" to the Federal Action and the MacMahon decree, in the same manner as they would an action brought in, or a decree issued by, a New York court. We shall also show that Goldberg never raised this argument in the New York courts: while he argued below that the MacMahon decree barred him from suing respondents, he never so much as intimated that he thought the New York courts were "ignoring", discriminating against or failing to "recognize" or give "effect" to the MacMahon decree.

A. The New York courts gave full recognition to the Federal Action and MacMahon decree

It is ironic, in view of Goldberg's claim that the New York courts "ignored" or failed to "recognize" or give "effect" to the proceedings in the Federal Action, that he blithely acknowledges that the New York Supreme Court, the Appellate Division and the New York Court of Appeals all accepted, without question, his contention that his state court action was not barred by the Statute of Limitations if Goldberg timely asserted his claims in the Federal Action (Petition, page 34). In doing so, the New York courts simply followed the well-settled practice in New York of treating a federal action as a "prior action" which satisfies the tolling provisions of CPLR 205* to the same extent that a New York state action would. *Park & Pollard Co. v. Industrial Fire Insurance Co.*, 197 A.D. 671, 189 N.Y.S. 866 (1st Dept. 1921).

Similarly, the New York courts did not question Goldberg's contention that a federal injunction would toll the Statute of Limitations to the same extent a state court injunction would; that issue was settled almost fifty years ago by *Chance v. Guaranty Trust Co. of New York*, 251 A.D. 855, 297 N.Y.S. 293 (2d Dept. 1937). See also *Luoma v. Spearin, Preston & Burrows, Inc.*, 282 A.D. 612, 126 N.Y.S. 2d 543 (3rd Dept. 1953).

Instead, the focus of the argument below was whether the MacMahon decree had in fact stayed Goldberg from asserting his claims.

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* CPLR 205 (a) provides, in pertinent part:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff...may commence a new action upon the same transaction or occurrence...within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action."

The New York Supreme Court held that the MacMahon decree had not barred Goldberg from suing the respondents. It based its decision on a review of the text of the MacMahon decree, the affirmance by the Second Circuit of those portions which purported to restrict Goldberg, and on Goldberg's own conduct after the decree was issued.

We submit the New York Supreme Court's holding is correct: the MacMahon decree never purported to bar Goldberg from asserting claims against the respondents. It only enjoined him from assisting others to bring actions against the respondents. Moreover, until Empire joined Goldberg in the Federal Action, Goldberg never so much as suggested he believed he was so restrained. Until May 1974 — eight months after the MacMahon decree was issued — Goldberg did not advise Judge MacMahon that he had any personal claims against the respondents and did not seek clarification or modification of the MacMahon decree. When he appealed the MacMahon decree, he did not complain to the Second Circuit that he had been barred from suing respondents. His only objection was to the district court's finding that he had acted unethically. Moreover, when Goldberg, in May 1974, finally asked leave to assert claims against the respondents, Judge MacMahon readily signed an order explicitly authorizing him to do so, with the full consent of the very respondents who Goldberg now claims would have sought to punish him for contempt should he have dared to sue them earlier.

In the Appellate Division, Goldberg did not raise the New York Supreme Court's rejection of his argument concerning the tolling effect of the MacMahon decree, and the Appellate Division did not address that issue.

While Goldberg subsequently argued to the New York Court of Appeals that the Supreme Court's rejection of his argument concerning the MacMahon decree was erroneous, he did not contend that the lower court had failed to give it due recognition because it was a federal, rather than a state, claim. That contention was intimated for the first time only in Goldberg's Petition for a writ of certiorari.

Instead, Goldberg merely argued that the New York Supreme Court had read the MacMahon decree too literally. He claimed that such a reading failed to take into account the psychological trauma the decree had caused him, and his consequent fear of taking any action which could even remotely be construed as a possible violation of the decree. Goldberg also argued that the lower court had misinterpreted his actions because his counsel had failed to advise that court of the May 1974 consent order.

During oral argument in the New York Court of Appeals, Goldberg's counsel was questioned pointedly concerning the alleged impact of the MacMahon decree. As was true in the New York Supreme Court, the focus in the New York Court of Appeals was solely on whether the decree had stayed Goldberg from asserting claims, rather than whether a federal stay would toll the Statute. Several of the judges indicated grave doubt that the decree had barred Goldberg from asserting claims, or even that he had reasonably held such a belief or had ever entertained the possibility of asserting any claims, prior to the time Empire sued him. Since the New York Court of Appeals ultimately affirmed for the reasons set forth in the decision of the Appellate Division (which had not discussed the MacMahon decree), the Court of Appeals must be deemed to have rejected Goldberg's contention *sub silentio*. *Grubb v. Public Utilities Commission*, 281 U.S. 470 (1930).

B. This case raises no "special and important" reasons for review

In view of the facts that the New York courts have long recognized that federal actions and decrees are to be accorded the same treatment as state actions and decrees for purposes of the Statute of Limitations, *Park & Pollard Co. v. Industrial Fire Insurance Co.*, *Chance v. Guaranty Trust Co. of New York*, and *Luoma v. Spearin, Preston & Burrows, Inc.*, *supra*, and that Goldberg has cited nothing in the record to suggest that the state courts failed to do so in this case, the only "federal issue" arguably presented is whether the state courts correctly construed the intent and scope of a clearly worded federal decree.

We respectfully submit that such an issue does not present a "special and important" reason for review by this Court.

While Rule 17 of the Rules of the Supreme Court does not purport to itemize all the situations in which this Court may elect to grant certiorari, a comparison of the issues which this Court has indicated may present appropriate occasions for grant of certiorari with the issues raised in this case highlights how lacking in importance Goldberg's claims are.

Rule 17.1 (b) and (c) (the only portions of Rule 17 that deal with state court decisions) state that the Supreme Court may grant certiorari where necessary to resolve conflicting interpretations of federal law among state and federal courts. No such question is presented here. In the first place, the Second Circuit has already held – and Goldberg has not contested – that Goldberg's underlying claims are based on state law, rather than federal law. *Federman, supra*. Secondly, even if the proper interpretation of a federal decision is itself regarded as a federal question, where the federal decision involved is but a specific decree that purports to govern only the conduct of the parties involved under a highly unusual fact situation, the possibility of a conflict arising among the state courts or between the state and federal courts is, to put it mildly, highly remote.

This Court has long admonished parties that it does not sit to dispense individual justice in individual cases:

> "...[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties...".

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

No such important principle is presented here. Even if it were true that the New York courts erred in construing the MacMahon

decree — and we believe the state courts' decision was correct — Goldberg has utterly failed to show that this alleged error is of importance to the public, rather than only to himself.

His contention that allowing the New York courts' decision to stand will have a "chilling effect" on the enforcement of the federal securities laws is frivolous on its face. The New York courts merely held that a so-called "whistle blower" is subject to the same Statute of Limitations as any other person who claims his reputation has been damaged.

We therefore urge this Court to dismiss Goldberg's petition for want of a substantial federal question.

CONCLUSION

The Supreme Court should deny certiorari.

Respectfully submitted,

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